

Public Hearing on Orphan works –

October 26, 2009, EU, Brussels – Panel 2: How to best recognize orphan status

slide: <http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-sld-091026.pdf>

text: <http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-txt-091026.pdf>

Copyright's New Clothes ... or is it Old Clothes

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Based in part on (still a draft):
Orphan Works and the Google Book Search
Settlement – an International Perspective.
<http://www.datcha.net/ecrits/liste/orphan-gbs.pdf>

Note : for simplicity and clarity, this is primarily about printed works, and particularly about text.

Why do we have this Hearing ?

Orphan works have existed for a long time: no one really cared and specific laws (Japan, Canada) were seldom used. Why this sudden importance ?

Because of **drastic technical and economic changes**.

But shouldn't they impact the legal system more deeply than via a few exceptions / limitations

And it seems that former solutions have become the problem.

A phase transition in the culture ecology : e. g. copy + send = \$0

(Digitization + Internet) changes the economic and social laws of the culture and copyright ecology.

This **enables new** economic, social, and legal engineering and devices and **disables former** ones.

Copyright Engineering must be consistent with underlying technical, economic and social physics

Some facts about the digital world

Copying (and format shifting) is a technical part of the medium [logic # implementation]

Making copies is no longer an economic activity – Though selling copies may still be

Open/free access is now another normal exploitation, *very important to research and teaching (green paper)* while commercial exploitation used to be the only way.

Petabyte data bases, freely accessible worldwide at no cost to user, are now possible

==> **Berne 5(2) “no formalities” is obsolete ... almost.**

It is now a problem rather than a solution (to a 19th century problem)

Indexation and Digital Access to all books will happen

- it makes economic sense in a digital world
- it is desired by nearly all concerned and *essential for academia & knowledge dissemination*

The real **issue is modalities** : access, control, profit – and the problem of **Orphan Works**.

Any form of **exploitation will be an infringement** ==> **requires a new exception / limitation**

How should such an exception / limitation be designed ?

Orphan issues

Can **Orphan status** be **based on** (failure of) **search for the owner** : reasonable ... diligent ?

It must make economic sense, thus is dependent on intended use.

- **Large scale** dissemination for access by a wide audience
 - Extended search is economically not tractable
 - Must be based on an **international** (distributed) **registry**
 - compatible with the intent (not the letter) of Berne 5(2)
- **Isolated exploitation** involving investment / profit
 - More diligent (?) search is economically tractable
 - Need to protect owner's interest
 - Need to protect user's investment

Designing the exception

The **three-step test** of exceptions and limitations is the **guiding principle**

- 1) special case: *changes should be minimal* to achieve the stated policy aim:
(1) make all books available to the public & (2) allow exploitation of specific works
- 2) no conflict with normal exploitation of works:
Open access is a normal mode of exploitation, increasingly used.
Access control and payment enforcement are exclusive rights and conflict with open access.
Economic barriers are unwarranted further infringement (*minimality principle*)
without benefit to absent owners & running against the stated purpose of exception.
Privacy concerns & true Open Access prevent organizing deferred payment to owner.
However, for commercial exploitation of specific work, requiring [*diligent search and*]
advance price fixing for deferred payment to resurfacing owner is not an obstacle and is a
security for both owner rights and user investment. (cf U.S. Orphan Works Act)
- 3) no unreasonable prejudice to legitimate interests of . . . ?
authors (Berne 1979, WCT 1996, France DADVSI 2006): access restrictions prejudice the
only remaining interest of (unreachable ?) authors: *to be read and known*
owners (TRIPS 1994, EUCD 2001): they are not exploiting the work ... & are often authors.
Actual access or use may better revive the work and create new revenue to be claimed.

The role of the Registry

International Registry + standardized metadata:

- formerly impossible technically
- now possible in the digital / Internet world – i.e., the very world that is raising these issues
- compatible with the intent (not the letter) of Berne 5(2)

Copyright remains with rights holders as now, but not enforceable unless correctly registered.
(e.g. U.S. Copyright Code § 411 and § 412)

Modalities to be analyzed: Free access to registry (advertising support ?) – registration delays – etc.

To summarize

Owners can exercise their rights at any time. They only have to maintain up to date registration.

Orphan works should be freely accessible by the public

Any obstacle (payment, DRM) is an unwarranted **infringement on the exclusive right to prohibit**

Setting a price to be paid on request from resurfacing rights holders may be acceptable for those
uses requiring a significant investment:

- it will not then be a determinant factor in the decision to use the work.
- it will secure both the owner's right and the user's investment

Conclusion

Authors / owners are entitled to their rights and to be provided easy means to assert them,
but should no longer impose on society the burden of searching for them

Berne 5(2) “no formalities” rule was: **a convenience** dictated by practical constraints
not a natural right

In the copyright battlefield

- "It is forbidden [...] to mutilate or steal from corpses"
The contemporary law of armed conflict, Leslie C. Green, page 144
- **Do not rob dead authors of their public**